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Hearing: May 11, 2017 at 11:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re

261 East 78 Lofts LLC,

Debtor.

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Chapter 11

Case No.: 16-11644-shl

**OBJECTION OF NYCTL 2016-A TRUST, and THE BANK OF NEW YORK MELLON AS COLLATERAL AGENT AND CUSTODIAN FOR THE NYCTL 2016-A TRUST TO APPROVAL OF THE DEBTOR'S AMENDED CHAPTER 11 AMENDED PLAN OF REORGANIZATION**

TO THE HONORABLE SEAN H. LANE,
UNITED STATES BANKRUPTCY JUDGE:

NYCTL 2016-A TRUST ("**NYCTL 2016**"), and THE BANK OF NEW YORK MELLON as Collateral Agent and Custodian for the NYCTL 2016-A Trust ("**BNY**") (collectively, the "**Tax Lien Creditors**"), by their undersigned counsel, Windels Marx Lane & Mittendorf, LLP, hereby submit this objection to the approval of the debtor's amended plan filed on April 27, 2017 (ECF Doc. No. 74) (the "**Amended Plan**"), and respectfully represent the following:

**Introduction.**

1. The Tax Lien Creditors object to approval of the Amended Plan because the Plan it describes is not confirmable because it (a) violates the Bankruptcy Code requirement that

debtors make cash payments to their secured tax lien creditors, and instead allows the debtor to unfairly withhold cash and sell collateral, (b) violates the absolute priority rule (c) fails to preserve and provide the indubitable equivalent collateral security of the property securing the tax liens, thus impairing the Tax Lien Creditor's claim while designating it as unimpaired and (d) violates the "pay first litigate later" rule.

2. Specifically, (a) holding escrow for payment of a tax lien obligation while an owner disputes the amount with the tax authority is contrary to law; (b) the amount being proposed for escrow is inadequate, in that it (i) fails to provide the "indubitable equivalent" of the existing security to the creditor, and (ii) the amount proposed by the debtor to deposit may not be sufficient to cover the existing claim, much less the interest that is accruing at 18% per annum compounding daily, and (iii) the debtor's satisfaction of the obligation to the Tax Lien Creditors is conditioned on the sale of the property, coupled with conclusion of the adversary proceeding under case number 16-01227-SHL (the "**Adversary Proceeding**"). Significantly, there is no known "end date" by which the Adversary Proceeding will conclude. Even more significant subsequent to the sale of the property the Tax Lien Creditors will no longer be a secured party by virtue of the sale coupled with no "end date" in the Adversary Proceeding resulting in the entire risk and cost of implementing the Amended Plan onto the Tax Lien Creditors, contrary to the letter of law. The debtor's Amended Plan hinders and delays indefinitely payment to the Tax Lien Creditors. The debtor has proposed its Amended Plan without good faith and by means prohibited by law and is not confirmable, and therefore approval of the Amended Plan should be denied, and the case should be dismissed or converted to a case under chapter 7 of the Bankruptcy Code.

**Background.**

3. The Tax Lien Creditors are the holders of certain priority tax and other City of New York liens against real estate owned by debtor (the "**Debtor**") located at 261 East 78th Street, New York, New York [designated as block 143, Lot 21] (the "**Property**").

4. The Tax Lien Creditors filed a Proof of Claim in this matter on April 14, 2017 in the amount of $823,890.78, with statutory interest at the per annum rate of eighteen (18) percent, which continues to accrue. The amount due to NYCTL 2016, as of April 27, 2017, is $977,002.95. In the Amended Disclosure Statement, the Debtor acknowledges that the Property is subject to $1,000,000.00 in tax liens held by Tax Lien Creditors (ECF Doc. No. 75); however in the Amended Plan, Debtor states that the Property is subject to $100,000.00 in tax liens held by the Tax Lien Creditors. See ECF Doc No. 74 at ¶ 1.2.

5. On September 1, 2016 the Debtor filed an initial Chapter 11 Plan of Reorganization and Disclosure Statement (ECF Doc. Nos 15, 16). Thereafter on April 27, 2017 the Sebtor filed an Amended Plan and an amended disclosure statement ("**Amended Disclosure Statement**") (ECF Doc. Nos 74, 75).

6. The Plan requires the Debtor to sell the property with a closing date on or before May 17, 2017 but no later than May 24, 2017 which is the date of the Foreclosure Sale scheduled on behalf of Madison Capital Lenders ("**MCL**"), another creditor in the instant proceedings.

**4.2 Treatment-** The Debtor's pre-petition and post-petition real estate tax liens are subject to the to the (New York Real Property Law) 505 Action which will be resolved post-petition. The Tax Lien Creditors shall receive a cash distribution on the closing date equal to an undisputed portion of all outstanding real estate taxes of approximately $600,000.00. A separate reserve of approximately $500, 000.00 will be established at closing to be held in escrow, paid to the prevailing party in the 505 Action or pursuant to the parties' agreement. Additionally, Debtor treats the Tax Lien Creditors claim as unimpaired and designated the claim in Class 1, and therefore the Tax Lien Creditors have conclusively deemed to have accepted the Amended Plan pursuant to section 1126(f) of the Bankruptcy Code.

**Objections**.

**A. The Amended Plan is not confirmable and therefore the should not be approved**

7. Because the Debtor's Amended Plan is not confirmable, it therefore cannot be approved. It is well established that where a plan is unconformable on its face, soliciting votes would be a futile act and therefore the plan should not be approved. *See In re American Capital Equipment, Inc.,* 405 B.R. 415, 424 (Bankr. W.D. Pa. 2009) (concluding that a disclosure statement must be rejected where a plan is facially unconfirmable); *In re Quigley Co., Inc.*, 377 B.R. 110, 115-116 (Bankr. S.D.N.Y. 2007) ("If the plan is patently unconfirmable on its face, the application to approve the disclosure statement must be denied, as solicitation of the vote would be futile."); *In re Main Street AC, Inc.*, 234 B.R. 771, 775 (Bankr. N.D. Cal. 1999) ("It is now well accepted that a court may disapprove of a disclosure statement, even if it provides adequate information about a proposed plan if the plan could not possibly be confirmed."); *In re Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) ("If, on the face of the plan, the plan could not be confirmed, the Court will not subject the estate to the expense of soliciting votes and seeking confirmation.")

**B. The Amended Plan Violates the Absolute Priority Rule**

8. The absolute priority rule is recognition of the general principle that creditors, in the order of their contractual or judicially obtained priorities, must be satisfied in full from the debtor's nonexempt assets if equity security holders are to retain any interest in the debtor's

assets. See. B-4c Collier on Bankruptcy App. Pt. 4(c) (16th 2017). The Debtor is proposing to pay MCL, a subordinate lien holder by virtue of a mortgage, $15,000,000.00 million of equity in the collateral from the proceeds of the sale, without providing for the full payment of the principal amount of the Tax Lien Creditors' claim, with interest, fees, costs and charges. By satisfying a subordinate lien before the Tax Lien Creditors, the Amended Plan violates the Bankruptcy Code's absolute priority rule.

**C. The Amended Plan renders the Tax Lien Creditor's claim impaired pursuant to Bankruptcy code 11 U.S.C. § 1124(1)**

9. Debtor is proposing selling the property without providing for the full payment of the principal amount of the Tax Lien Creditor's claim, than setting aside the remainder of the claim in escrow. Further, the Amended Plan differs from the Amended Disclosure Statement in that the Amended Plan sets "approximately $500,000" *sic*. to be held in escrow whereas the Amended Disclosure Statement sets "approximately $600,000" *sic*. to be held in escrow. (See ECF Docs No 74 at ¶ 1.4 and ECF Doc No 75 at §I ¶3 pg 2). Regardless, the Debtor's Amended Plan impermissibly alters the requirements of the Bankruptcy Code regarding the preservation and treatment of tax lien claims, thus the Tax Lien Creditor's claim is effectively impaired under Bankruptcy Code § 1124. *In re Greenwood Point, LP*, 445 B.R. 885, 907 (Bankr. S.D. Ind. 2011) ("Here, the Plan proposes that the real estate will vest in the reorganized debtor free and clear of liens, including the lien of the Marion County Treasurer. The proposed loss of the Marion County Treasurer's valid lien rights prior to payment in full of its claim under the Plan is additional, and significant, impairment under Section 1124. A secured creditor must retain its lien for the [P]lan to be fair and equitable under Section 1129(b)(2)(A)…").

10. Clearly, the Debtor's Amended Plan alters the legal and equitable rights of the Tax Lien

Creditors and impairs their claims and interests. 11 U.S.C. § 1124(1). The Amended Plan mischaracterizes the Tax Lien Creditors' class of claims as unimpaired, thereby impermissibly deeming the Tax Lien Creditors to have accepted the Plan.

**i. The Amended Plan neither preserve the Tax Lien Creditors lien against the property nor provides an "indubitable equivalent"**

11. The Debtor should not be permitted to sell the property absent complete satisfaction of the obligation to Tax Lien Creditors before or at the time of closing. Thus, the Amended Plan's failure to preserve the Tax Lien Creditors' liens on the Property pending their payment in full, and the proposed substitution of inadequate collateral does not provide to the Tax Lien Creditors, as objecting fully secured creditors, the fair and equitable treatment to which they are entitled under Bankruptcy Code § 1129(b)(2)(A). Moreover, there is no "indubitable equivalent" as the Amended Plan neither retains the Tax Lien Creditors' liens on the Property when it is sold (Bankruptcy Code § 1129(b)(2)(A)(i)(I)), nor assures that the Tax Lien Creditors' will receive deferred cash payments totaling the allowed amount of the claim. *Id*. As a result of these failures, the Amended Plan fails to provide any assurance that the entire amount of the claim will be satisfied.

**D. The Amended Plan violates the "pay first litigate later" rule, requiring a taxpayer to pay municipal taxes prior to challenging the propriety**

12. The Debtor's Amended Plan also violates the law because it proposes to prosecute or litigate before satisfying the tax liens, therefore the Amended Plan and Amended Disclosure Statement should *not be* considered. The Debtor's Amended Plan seeks to prosecute an Adversary Proceeding prior to the satisfaction of paying taxes directly contravening the "pay first, litigate later" rule that applies to the collection of municipal taxes, including sewer charges, requiring taxpayers to pay a disputed tax before challenging the propriety of the tax in a court

proceeding. Welch Foods, Inc. v. Wilson, 262 A.D.2d 949, 692 N.Y.S.2d 873 (4th Dept. 1999) (internal citations omitted). By compelling the Tax Lien Creditors to wait, possibly for years while the Adversary Proceedings conclude alters the Tax Lien Creditors' legal, equitable and contractual rights and impairs their claim and lien rights. Most significantly, the Debtor, will not be prejudiced by paying the full amount the claim due to the Tax Lien Creditors, on or before the closing of the sale and prior to the conclusion of the Adversary Proceeding, because although highly unlikely, if the Debtor is successful at reducing the amount of the claim in the Adversary Proceeding than New York City will issue a repayment of excessive funds.

**E. The Plan is not feasible and therefore not confirmable**

13. A chapter 11 plan cannot be confirmed based upon a litigation contingency, in the instant matter the Adversary Proceeding. The Debtor must prove that the plan is feasible under Bankruptcy Code § 1129(a)(11). "As the Second Circuit explained, the key inquiry is whether, as a practical matter, provisions specified in the proposed plan of reorganization can be done post confirmation. *In re Bergman*, 585 F.2d 1171, 1179 (2d Cir.1978); *In re Greene*, 57 B.R. 272, 277–78 (Bankr.S.D.N.Y.1986). The purpose of the feasibility test is " 'to prevent confirmation of visionary schemes which promise creditors and equity holders more under a proposed plan than the debtor can possibly attain after confirmation.... [W]here the financial realities do not support the proposed plan's projections or where proposed assumptions are unreasonable, confirmation of the plan should be denied." *In re Young Broadcasting, Inc., et al.*, 430 B.R. 99, 128 (Bankr. S.D.N.Y. 2010) (citations omitted). The aforementioned demonstrates that the Amended Plan is not confirmable because of numerous deficiencies *inter alia* the failure to comply with the absolute "priority rule," the Amended Plan neither preserve the Tax Lien Creditors lien against the property nor provide an "indubitable equivalent," therefore the Tax Lien Creditor's claim is

effectively impaired. Moreover the Amended Plan also violates the "pay first litigate later" rule. Simply put the Amended Plan is not feasible and therefore not confirmable.

**G. The correct amount of the Tax Lien Creditors' Lien must be stated in the Amended Plan**

14. The amount stated that is owed in tax liens held by Tax Lien Creditors in the Amended Plan is incorrect. Specifically, as of April 27, 2017, the amount due to the Tax Lien Creditors is $977,002.95 with statutory interest at the per annum rate of eighteen (18) percent, which continues to accrue. In the Amended Disclosure Statement, the Debtor acknowledges that the Property is subject to $1,000,000.00 in tax liens held by Tax Lien Creditors (ECF Doc. No. 75); however in the Amended Plan Debtor states that the Property is subject to $100,000.00 in tax liens held by the Tax Lien Creditors. See ECF Doc No. 74 at ¶ 1.2. For this reason alone the Amended Plan is facially defective and cannot be confirmed. See. *In re Pecht*, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986) ("If, on the face of the plan, the plan could not be confirmed, the Court will not subject the estate to the expense of soliciting votes and seeking confirmation.") Moreover, the Amended Plan differs from the Amended Disclosure Statement in that the Amended Plan sets "approximately $500,000" *sic*. to be held in escrow whereas the Amended Disclosure Statement sets "approximately $600,000" *sic*. to be held in escrow. (See ECF Docs No 74 at ¶ 1.4 and ECF Doc No 75 at §I ¶3 pg 2), therefore because the Amended Plan is facially unconfirmable the disclosure statement must be rejected. *See In re American Capital Equipment, Inc.,* 405 B.R. 415, 424 (Bankr. W.D. Pa. 2009)

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**WHEREFORE**, the Tax Lien Creditors respectfully request that the Court deny approval of the Debtor's Amended Plan, dismiss or convert this chapter 11 case to a case under chapter 7 of the Bankruptcy Code, and grant the Tax Lien Creditors such other and further relief as is just.

Dated: New York, New York
May 2, 2017

Respectfully submitted,

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